

S. 1034

S. 1034 is Senator Leahy's Bill. This Bill is intended to focus on problems experienced by FOIA requesters and submitters of information to the government. Part of the Bill is intended to override the recently issued Department of Justice guidelines on fee waivers.

Of particular concern to the CIA is section 8 of the Bill. This section would require any "(b)(3)" legislation, such as S. 1324, to be referred initially to the appropriate committees, i.e., the House Government Operations Committee and the Senate Judiciary Committee. Section 8 also provides that six years after enactment of the Bill no statute could be relied upon to withhold information as a "(b)(3)" statute unless the statute specifically referenced paragraph 552(b)(3) of the FOIA and met the criteria specified therein. It appears that this would require all current "(b)(3)" statutes to be reenacted within this six year time frame so as to specify them as "(b)(3)" statutes. This would, for example, mean that section 102(d)(3) of the National Security Act of 1947 (50 U.S.C. 403(d)(3)) and Section 6 of the CIA Act of 1949 (50 U.S.C. 403g), which CIA relies on as "(b)(3)" statutes, would have to be amended. In addition, section 8 of Senator Leahy's Bill would require any such amendatory language to pass through the Senate Judiciary and House Government Operations

Committees. Finally, Senator Leahy's Bill closes all loopholes by providing that no "(b)(3)" legislation could be considered on the floor of the House or Senate unless it had been reported by the appropriate committee. We strongly oppose this "(b)(3)" language because should we be unable to achieve enactment of the required amendments to section 102(d)(3) of the National Security Act and Section 6 of the CIA Act within the six year time frame, we would no longer be able to use these Acts as reasons for withholding information relating to intelligence sources and methods. In addition, we believe our oversight committees should have primary jurisdiction over any legislation concerning the needs of the Intelligence Community.

compliance with the requirements of this chapter, shall be available at a reasonable time for examination by authorized representatives of the Government.

"§ 2112 Termination of program

"A veteran may not apply for a program of job training under this chapter after September 30, 1984. Assistance may not be paid to an employer under this chapter for any period after September 30, 1985."

(b) The table of chapters at the beginning of such title and at the beginning of part III of such title are each amended by inserting after the item relating to chapter 43 the following new item:

"44. Veterans' Emergency Job Training Program _____ 2101."

Sec. 3. Section 2002A is amended—

(1) by striking out "and chapter 43" in the first sentence and inserting in lieu thereof "chapter 43, and chapter 44"; and

(2) by striking out "chapter 43" in the second sentence and inserting in lieu thereof "chapter 43 or 44".

Sec. 4. Subsection (c) of section 2003 is amended by—

(1) striking out "and" at the end of clause (11);

(2) striking out the period at the end of clause (12) and inserting in lieu thereof a semicolon and "and"; and

(3) adding at the end thereof the following new clause:

"(13) be functionally responsible for processing applications and approving certifications under chapter 44 of this title."

Sec. 5. There is authorized to be appropriated \$75 million to carry out the program established under this chapter, for purposes including payments to employers, information and training for eligible veterans and employers, and such salaries, rents, printing and binding, travel and communications expenses as are reasonably attributable to the operation of the program.

Sec. 6. The amendments made by this Act shall take effect October 1, 1983.

By Mr. LEAHY:

S. 1034. A bill to amend the Freedom of Information Act to the Committee on the Judiciary.

FREEDOM OF INFORMATION ACT IMPROVEMENT ACT OF 1983

• **Mr. LEAHY.** Mr. President, I am today introducing the Freedom of Information Improvement Act of 1983. The improvements to the FOIA in this bill are all important ones and all have one common aim: To make this historic legislation fairer, faster, and more effective.

We are facing a year when it will become something of a cliché to discuss whether the government and technology will prevail over the individual mind and human spirit.

I can note with satisfaction that 1984 will not mark the beginning of Big Brother and the end of free expression, but rather the 10th anniversary of amendments to FOIA securing in practice rights that had been established in theory 8 years earlier.

So important has the Freedom of Information Act become in an age when complexity can make secrecy pose as a virtue, that it is difficult for me to remember that FOIA is only a statute and not a part of the Constitution. But the act is only another statute on the books, and the current administra-

tion has given ample warning that it is one statute it would like to see weakened or even crippled.

FOIA, more than any other law on the books, maintains the faith of the American people in a government that is so large and necessarily so complex that no individual can pass judgment on its integrity or the wisdom of its policies. The availability of the documents and records that convey the essence of government has helped dramatically to fill this void in understanding and communications. Press conferences and news releases—manicured versions of reality—are no substitute for primary materials.

FOIA has led to public disclosure of government waste and wrongdoing, as well as expanding public knowledge of health, safety, and environmental matters. Through FOIA, the press has revealed discrimination in the administration of Federal contracts, major Medicare fraud by private health organizations, defective and unsafe consumer products, and harmful drugs and medical devices.

But the full benefits of the act are much more than the sum of these and many other specific achievements. A government that operates in public is accountable to the electorate in a manner that is very different from a government operating in secrecy. The mere idea that a decision will be subject to public review and the documents underlying that decision to public scrutiny creates an atmosphere of accountability.

In this context I find the current administration uneasy with the legacy of FOIA since 1966 and hostile to the presumption of openness. To be specific:

On March 11, the administration announced a new Presidential directive that comes close to paranoia over leaks. All Government employees with access to classified information—even if the classification is low—could be compelled to sign agreements enforceable by the Justice Department that will keep them from discussing or writing about anything even remotely connected with their work without prior clearance even years after leaving Government service. Up to now only the employees of the CIA and equally sensitive agencies have been required to enter such agreements. The agreements will be policed with lie detector tests.

The Department of Justice recently adopted a stringent—perhaps I should say stingy—policy on fee waivers, after the Senate Judiciary Committee rejected in the last Congress a similar proposal in the administration's bill.

EPA has undertaken a policy to restrict the release of industry data that would help expose pesticide threats to workers and others, after the House and the Senate Agriculture Committees rejected a similar proposal.

President Reagan's Executive order on classification has swept away a trend of nearly three decades aimed at

better informing the American public about national defense and foreign policy issues. Agency officials are not required to consider the public right to know in classifying information. Doubts are resolved by classifying information at the highest, not the lowest, level of secrecy, despite abundant evidence that classification is often sloppy and unnecessarily restrictive. There is no longer a requirement that an agency find identifiable potential harm to national security before material is classified.

More than any one of these examples, I am concerned that all of them together reflect a policy that promotes secrecy as the norm dominating transactions with the Government.

It is at least in part to restore the norm and reverse the current decline in the spirit of openness that I am presenting this bill today. Ironically the genesis of this bill was the debate in the Judiciary Committee a year ago on the administration's FOIA proposal, which in its original form would have devastated the act as we have come to know it.

Through reasoned discussion and compromise, the committee unanimously accepted a substitute for the bill which left the essential features of the law intact. Senator Hatch has introduced a bill, S. 774, which contains the essence of that compromise. S. 774 primarily considers the problems Government is having in administering the act. While I intend to work with Senator Hatch on those problems, I think we also must address the problems that requesters of information are having with the Government.

The bill I am presenting today addresses some of the major concerns of both submitters and requesters about the functioning of the act. It does not purport to deal with proposed changes in the language of FOIA exemptions, an area that is covered in Senator Hatch's FOIA bill. Most notable among these is the Judiciary Committee compromise on the law enforcement exemption, which I helped to craft. I fully support its adoption in S. 774 and will lend my voice in its support when it comes up for debate in its current language. Since the focus of my bill is on requester and submitter problems, I did not seek to include similar language in my bill.

Another item on my own Senate agenda which is omitted from this bill is the language Senator DURENBERGER and I and four of our colleagues from the Senate Select Committee on Intelligence introduced last April to restore the FOIA exemption for national defense and foreign policy matters to its former meaning requiring "identifiable damage" before an agency could withhold information. The President's 1982 Executive order on national security had reversed the presumption of openness that had prevailed with Presidents of both parties for more than 15 years.

April 12, 1983

CONGRESSIONAL RECORD — SENATE

S 4427

Senator DURENBERGER and I plan to reintroduce this important component of FOIA reform at a later date.

In summary, my bill would do the following:

The fee waiver standard is strengthened for members of the news media, nonprofit groups who intend to make the information available to the public, and persons engaged in noncommercial scholarly research. Other needed changes are made concerning fees.

Requesters will be able to challenge a denial of a fee waiver in court under a standard which permits the court to take a fresh look at whether the waiver standard has been met.

Agency time limits under FOIA would be made more realistic and enforced more vigorously.

Time limits will be made enforceable by creating economic penalties for an agency that does not meet the time limits, while giving economic incentives for timely compliance.

The tide of specific statutory agency exemptions we have seen recently will be stemmed by requiring that exemption bills come before the Senate Judiciary Committee and House Government Operations Committee, which have legislative jurisdiction over FOIA.

Fair procedures to allow submitters of information a reasonable opportunity to object to release of data are established.

Commercial users, who account for two-thirds of the costs to the Government in processing FOIA requests, would bear their fair share for access.

FEES, WAIVERS AND OTHER FEE PROVISIONS

Access to information can be scuttled as effectively by the barriers of cost as by overly broad exceptions. As a result of an extensive report by the House Government Operations Committee in 1972, Congress was well aware of the use of excessive charges to deny access when FOIA was amended in 1974. In that year the fee waiver provision was enacted, and the Senate report made it clear that the section was to be liberally construed by the agencies to promote access.

Contrary to that congressional intent, evidence on agency fee practices supports oversight findings that:

(M)ost agencies have been too restrictive with regard to granting fee waivers for the indigent, news media, scholars, and nonprofit public interest groups.

Report on oversight hearings by the staff of the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, "Agency Implementation of the 1974 Amendments to the Freedom of Information Act," 95th Congress, 2d session (March 1980) (committee print).

These problems were exacerbated on January 7, 1983, when the Department of Justice issued new guidelines on the administration of the fee waiver provisions of FOIA. The Department guidelines fail to mention the principle of liberal construction, but even more

ominous is its seeming reversal of the fundamental presumption of openness that is supposed to infuse every corner of the act. It is worth mentioning the five criteria that the Justice Department directs agencies to consider in meeting fee waiver determinations:

First, genuine public interest in the subject matter of the documents.

Second, value to the public of records themselves.

Third, availability of the requested information in the public domain.

Fourth, identity and qualifications of the requester, and

Fifth, personal interest of the requester.

These guidelines are a far cry from the fee waiver language in the act, which simply states that a fee waiver or reduction are to be granted in the public interest where "furnishing the information can be considered as primarily benefiting the general public," as opposed to a narrow, private interest. Not a single word in the long legislative history of the FOIA ever suggested that an agency could ask whether the recipient really needed the information—whether the "benefit" was substantial enough to warrant the inconvenience of honoring the request. In this context the phrase "benefiting the general public" might have read "going to the general public."

The fee waiver criteria in the 1974 amendments only asked who was benefiting from access. The Reagan administration has shifted the focus to asking what is being requested—is it really something the public wants and needs? The shift is crucial. Once the government is the decider of what is and is not important to know, the freedom of information departs completely. Criteria (1) and (2) of the Justice Department, through dealing only with fee waivers, are strong echoes of the paternalism that characterized government's relationship to citizens seeking information before the enactment of the act in 1966. The same criteria are also the watchery of governments that control all information and suppress all criticism.

If a reporter or a scholar seeks information, there is no part whatsoever that an agency should play in deciding whether the news story or research project should be undertaken or whether the public will really benefit from the requester's undertaking. The sharp criticisms of the press by this and other Administrations are convincing evidence that government frequently and ardently believes that unimportant items are covered, while legitimate news is ignored. Only history will reliably judge when and if these criticisms are valid. The point that is immediately important is that no access statute can be effective that turns on such subjective criteria.

My bill would replace these subjective criteria with a simpler and fairer system. Section 3 of the bill would amend the FOIA to specifically re-

quire that documents shall be furnished without charge when the information is not requested for a commercial use, and the request is being made by or on behalf of first, any individual, or any educational or noncommercial scientific institution, whose purpose is scholarly or scientific research, second, a person engaged in a journalistic activity, or third, a nonprofit group that intends to make the information available to the general public.

In the face of unduly narrow agency interpretations of the "public interest" fee waiver standard, this provision would constitute a dispositive congressional finding of qualification for waiver of fees in these categories of requests.

Section 3 of my bill would also amend the fee waiver provision of the FOIA to require that documents shall be furnished without charge or at a reduced charge when the agency determines that the waiver or reduction of the fee is in the public interest because furnishing the information is "primarily benefiting the general public rather than the commercial or other private interests of the requester."

This language is completely consistent with the historic purposes of the FOIA. It not only establishes the interests of the general public as paramount, but it bolsters the efforts the agencies should be making to collect full fees from requesters whose interests are commercial and who should pay their own way. Commercial requests account for about 60 percent of total agency costs under the FOIA.

I know that there are some difficult distinctions implicit in the fee-waiver language. We intend to create a fee waiver right for journalistic activity, and we are aware that determining who is a journalist is not as easy as checking a driver's license. It would be easy to say that journalists are people who have regular positions with an established newspaper, but that would discriminate against freelance journalists, and particularly those who are just starting out in their careers. At the same time, we do not want to define a journalist as anyone who wants information but has only a vague and generalized hope of writing something some day. In the overwhelming number of cases journalists will be able to prove their status, either because they work for a broadcaster, newspaper, or other periodical or because they are engaged in a project that is clearly being undertaken with public dissemination in mind, even though the audience may not be large.

It may sometimes be equally difficult to define a commercial use. Newspapers must be "commercial" if they are to survive, but they are organizations whose commercial motives are outweighed, at least for purposes of the FOIA, by their function of benefiting the general public. That is why

S 4428

CONGRESSIONAL RECORD — SENATE

April 12, 1983

their entitlement to a fee waiver is absolute. At the other end of the scale are organizations which are much more like the research arms for industry and which are in the business of retrieving information that is not readily available otherwise. Both these kinds of companies and newspapers will be able to say they are disseminating information. But I believe that the agencies will have little trouble distinguishing what is essentially commercial research from publications that are principally engaged in informing the public.

UNIFORM FEE SCHEDULES

Variations in fee schedules from one agency to another have confused members of the public, and have created the impression that different agencies do not charge comparable fees for comparable efforts in responding to requests. Although there may be some differences in the actual costs of agency services, greater uniformity in fees would be possible and would be desirable in most cases.

Section 3 of my bill would accordingly authorize the Office of Management and Budget to promulgate guidelines providing a uniform schedule of FOIA fees for all agencies. Each agency would be subject to these guidelines in establishing its schedule of fees and would be required to justify through rulemaking any fees higher than the uniform schedule. This provision would promote uniformity in fees throughout the Government, but would preserve the flexibility of agencies that needed to address higher costs.

REVIEW COSTS

One of the perennial debates over the FOIA has concerned just which agency costs should be recoverable through fees. Under the present law costs related to the examination and review of records cannot be charged to requesters. Reflecting the experience of nearly two decades, the new bill would permit recovery of the costs of reviewing responsive records—true processing costs. The time spent in reviewing legal or policy issues surrounding the request would not be recoverable, nor the cost of agency reviews conducted on an appeal of an initial agency denial of a request. Also excluded would be administrative overhead costs, like personnel, supplies, postage, and the like.

This compromise on costs would alleviate the most excessive cost burdens that agencies have experienced as FOIA requests have burgeoned over the years, with only 5 to 10 percent of all costs being recovered. But subjective factors—such as the intensity of an agency's research of the law—are eliminated, so that fees cannot be used to discourage requests under the act.

FEE ASSESSMENT THRESHOLD

In cases where the routine costs of collecting fees from a requester would equal or exceed the amount of the fees to be collected, most agency fee sched-

ules provide that the fees should not be charged at all. This commonsense principle would be codified and made mandatory by section 3 of my bill.

STANDARDIZED CHARGES

Some agencies may find it useful to develop standardized charges for categories of requests having similar processing costs. Section 3 of my bill would allow agencies, in their discretion, to provide for such standardized charges in their fee schedules.

TIME LIMITS

A constant tension between requesters and agencies has been the time limit provisions of the FOIA. Often delay can be equivalent to denial. On the other hand, complex and voluminous requests cannot be answered overnight. Always the question boils down to the standards to be applied by the agency.

The present time limit provisions of the FOIA were established by Congress in 1974, in response to substantial evidence that agency delay in the handling of FOIA requests was a major problem. Although most agencies are complying with the deadlines enacted in 1974, excessive delay persists at a number of agencies, including the FBI, the CIA, and the Department of Justice. These agencies have complained of the unreasonableness of the deadlines in light of the unexpectedly large number of FOIA requests filed since 1974 and the special difficulties that some requests present.

My bill would retain the essential structure of the act's deadlines—10 working days for a response to an initial request and 20 working days for response to an appeal. At the same time, the bill would provide agencies with authority for extensions of time limits of up to 30 days, upon written notice citing one or more unusual circumstances set forth in the statute.

In the past, some time limits have been grossly unrealistic. As a result, there has been only a perfunctory attempt at enforcement, especially where the law appeared to mandate the impossible. This bill seeks to establish realistic time limits, and then to provide a basis for enforcement in fact, rather than theory. If agencies violate time limits, the court may assess reasonable costs, including attorney's fees, incurred by a requester after the failure of the agency to comply with the time limits, even if the agency prevails and access is ultimately denied. The point is that time limits should be fair to everyone, but should not be an indirect means of denying access.

The bill also adds a provision recognizing that, in compelling circumstances, a FOIA request should be processed on an expedited basis. This should be especially helpful to the press, which often labors under particularly severe time constraints.

DISPOSITION OF COLLECTED FEES

Some agencies have complained about the seeming injustice of requir-

ing them to absorb the costs of FOIA compliance while prohibiting them from retaining fees collected from the requesters they serve. Collected fees are now turned over to the Treasury Department's miscellaneous fund, without providing any offset to the funds drawn from the agency's budget to support its FOIA activities.

Section 3 of my bill would permit an agency which complies with applicable time limits to retain one-half of the fees collected as a result of FOIA requests. The fee retention provisions of the bill would reward agencies that meet the time limits specified in the bill and would tend to diminish the burdens of agencies with particularly heavy FOIA workloads. It will be very important to structure the compliance criteria so that the reward system operates effectively and without favoring any class of requesters over any other class. During consideration of the bill we will explore which agency—the Office of Management and Budget, the Administrative Conference of the United States, the General Accounting Office, for example—will monitor compliance, and just which specific criteria for determining timely compliance would be fairest and most workable.

BUSINESS CONFIDENTIALITY PROCEDURES

When Congress enacted the FOIA in 1966, it expressly sought to protect legitimate confidentiality interests of the private business sector by exempting trade secrets and confidential commercial or financial information from the mandatory disclosure requirements of the act. But Congress did not provide submitters of such information with procedural rights that would insure that their confidentiality interests would be adequately considered by an agency facing a FOIA request.

The absence of any statutory requirements for an agency to give submitters notice and an opportunity to oppose disclosure left the protection of business confidentiality interests entirely in the hands of agency personnel, to handle on a case-by-case basis. This situation is in large part responsible for the doubts that have been voiced within the business community about the Government's ability to protect business confidentiality interests.

Section 6 of my bill would amend subsection 552(A) of the FOIA to require agencies to promulgate regulations specifying procedures that would permit submitters of trade secrets or confidential commercial or financial information to present claims of confidentiality to an agency before submitted information is released in response to a FOIA request. In order to cut down on fruitless administrative work under these regulations, an agency will be able to designate certain classes of documents that are unlikely to contain exempt information. The agency will be exempt from the requirement that it notify submitters of requests for documents within this class, but it

April 12, 1983

CONGRESSIONAL RECORD — SENATE

S 4429

must provide the submitter with the opportunity to file written objections to the release of any information in the documents at the time they are submitted.

It would also insure that submitters would be notified of the agency's final determination with respect to the release of submitted information. Submitters objecting to disclosure would be able to seek judicial relief to prevent it.

Submitter actions to enjoin disclosure must be brought prior to release of the documents, and usually would be commenced within 10 days after the final agency decision. If the submitter has not been given notification but learns of the pending disclosure, suit could be brought in the same manner as if such notice had been given.

Under the bill district courts would have jurisdiction over both submitters and requesters. Agencies would be required to notify requesters and submitters whenever a suit was brought by either over a particular request or submission. Appeals from agency decisions would be heard de novo by the court.

In order to avoid an undue advantage in favor of a well-financed submitter seeking to obstruct access through lengthy litigation, the bill provides that the court may in its discretion award attorney's fees and costs to a requester who has substantially prevailed. Fees are allowed against an agency as well as under current case law.

STATUTE OF LIMITATIONS

The present act contains no time limit for a requester to initiate a judicial action after an agency's final denial of a request. The bill would require that suits by requesters must be brought within 180 days of the agency's final administrative action. This is the same period as that set forth in title VII of the Civil Rights Act of 1964, the Age Discrimination in the Employment Act, and the Fair Housing Act of 1963.

The bill would not set a specific limitations period for action by submitters, but it would require that the submitter file a complaint before the information is disclosed.

The provision should promote judicial economy and ease administrative burdens without prejudice to requesters of information. Agency personnel would be able to close files instead of holding a requester's file indefinitely, and yet requesters could simply file an identical request to reinstate the process.

INDIVIDUAL AGENCY EXEMPTION

In addition to the attempts to weaken or repeal the FOIA directly over the years, there have been increasing numbers of exceptions to the act written into other legislation. Exemption (b)(3) of the FOIA excludes from the mandatory disclosure requirement information "specifically exempted from disclosure by statute."

Despite Congress efforts in 1976 to narrow the scope of section (b)(3) more and more information has been put beyond the reach of the public through these special exemptions.

One of the problems has been that many (b)(3) exemptions are not reviewed by the congressional committees that generally oversee the FOIA. Sometimes the exemptions are attached as riders to authorization or appropriations bills. Agencies like the Nuclear Regulatory Commission, the Consumer Product Safety Commission, and others have obtained (b)(3) exemptions.

In order to prevent ill-considered exemptions to the access mandate of the FOIA, section 8 of my bill would place specific limitations on an agency's ability to rely on the authority of (b)(3) exemption statutes when they have not passed through prescribed legislative channels and have not been previously brought to public attention through publication in the Federal Register.

This will not stop agencies from trying to limit access, and in some cases there will be legitimate reasons to withhold information. But what the bill will prevent, if enacted, is the passage of (b)(3) statutes without substantiation of their need and without the scrutiny of the committees in both Houses that have the FOIA high on their agendas and the experience to weigh each proposal on its merits.

OVERALL PURPOSE

In summary, this bill does not seek to revolutionize the Freedom of Information Act, but rather to conform its requirements to practical experience. If adopted, my bill would allow the FOIA to work with greater certainty and facility for requesters, would be fairer to submitters, and would ease the costs and burdens to the agencies that must respond under the act.

It is my hope that in time openness in government will become a routine expectation for everyone, so strongly rooted in law and practice that efforts to dampen it by an administration will necessarily fail. Any bill that makes the FOIA work more smoothly will hasten the arrival of that day.

I sense in my discussions with my colleagues on the Judiciary Committee that our efforts on behalf of freedom of information in the 97th Congress were not misspent. We had many differences but we learned to narrow them, and as a result of that hard work, there is a very new spirit in this body about the future of FOIA. Senator Hatch's bill and the bill I am introducing here represent a fresh start in a new Congress. I look forward to working together with him and my other committee colleagues toward what I know to be our common goal: a government that is open to its people.

By Mr. BENTSEN (for himself and Mr. Tower):

S. 1035. A bill to provide for the enforcement of a trade agreement between the United States and the Commission of European Communities concerning imports of steel pipe and tube products; to the Committee on Finance.

FAIR TRADE IN STEEL PIPE AND TUBE PRODUCTS
ACT OF 1983

• Mr. BENTSEN. Mr. President, I am today introducing S. 1035, a bill to enforce the steel pipe and tube trade arrangement negotiated between the Reagan administration and the Commission of the European Community (EC) with the approval of companies on both sides of the Atlantic last fall. The legislation, which has been introduced as H.R. 2299 on the House side by 21 Members of the Texas delegation, is designed to provide a mechanism for enforcing the arrangement.

Mr. President, last July there were pending in the U.S. Department of Commerce a number of antidumping and countervailing duty petitions alleging unfair trade practices in the importation and sale of European steel into the United States. At that time, it was a well publicized fact that the Department of Commerce was attempting to negotiate an arrangement with the EC and producers such that the antidumping and countervailing duty petitions would be withdrawn in return for limitations on European exports to the United States.

Since those negotiations appeared at one point likely to pertain exclusively to basic steel products, and since Texas is a principal producer of the more advanced pipe and tube steel products, I wrote to both the Secretary of Commerce and the President that summer urging them to assure in the agreements they negotiated that the European governments and producers would not be able under the agreements to divert subsidies and other unfair trade practices from basic steel to pipe and tube exports to the United States. I was assured then by the Secretary of Commerce that he would "carefully consider the effects of any proposed settlement on all parts of the domestic industry, including the Texas oil country tubular goods industry." OCTG is a principal pipe and tube product, used in various high specification applications around and in oilfields. The close relationship between basic steel and pipe and tube, and the ability of foreign producers to divert from one to the other has been recognized for some time. For example, OCTG were for sometime covered by the so-called trigger price mechanism (TPM), a device designed to deter dumping of steel products.

Subsequently, of course, the European Commission and the United States did agree in October 1982 to restrain the export of basic carbon steel to the United States to an average of about 5.5 percent of the U.S. market in 10 separate categories. Simultaneously, the Secretary of Commerce and the

II

98TH CONGRESS
1ST SESSION

S. 1034

To amend the Freedom of Information Act.

IN THE SENATE OF THE UNITED STATES

APRIL 12, 1983

Mr. LEAHY introduced the following bill; which was read twice and referred to
the Committee on the Judiciary

A BILL

To amend the Freedom of Information Act.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Freedom of Information
4 Improvement Act of 1983".

5 FINDINGS

6 SEC. 2. The Congress finds that—

7 (1) since its passage in 1966 and particularly
8 since it was amended in 1974, the Freedom of Infor-
9 mation Act has been a valuable means through which
10 individuals can learn how the Federal Government
11 operates;

1 (2) the Freedom of Information Act has led to the
2 disclosure of waste, fraud, abuse, and wrongdoing in
3 the Federal Government;

4 (3) the Freedom of Information Act has led to the
5 identification of unsafe consumer products, harmful
6 drugs, and serious health hazards; and

7 (4) to ensure its continued usefulness, the Act
8 should be amended in order to permit it to function
9 more smoothly, efficiently, and expeditiously, to allow
10 the Government to recoup more of the costs of imple-
11 menting the Act, to ensure that representatives of the
12 public continue to have free access to Government
13 records, to provide procedures which allow submitters
14 of information to object to release of such information,
15 and to ensure that the Act can easily be used by
16 individuals.

17 FEES AND WAIVERS

18 SEC. 3. Subparagraph (4)(A) of subsection 552(a) of title
19 5, United States Code, is amended to read as follows:

20 “(4)(A)(i) In order to carry out the provisions of this
21 section, each agency shall promulgate regulations, pursuant
22 to notice and receipt of public comment, specifying the sched-
23 ule of fees applicable to the processing of requests under this
24 section and establishing procedures and guidelines for deter-
25 mining when such fees should be waived or reduced. Such

1 schedules shall conform to the guidelines which shall be pro-
2 mulgated, pursuant to notice and receipt of public comment,
3 by the Office of Management and Budget and which shall
4 provide for a uniform schedule of fees for all agencies. Such
5 regulations—

6 “(I) shall provide for the payment of all costs rea-
7 sonably and directly attributable to responding to the
8 request, which shall include reasonable standard
9 charges for the costs of services by agency personnel in
10 the search, duplication, and processing of the request,

11 “(II) shall provide that no fee is to be charged by
12 any agency with respect to any request or series of re-
13 lated requests whenever the costs of routine collection
14 of the fee are likely to equal or exceed the amount of
15 the fee, and

16 “(III) may provide for standardized charges for
17 categories of requests having similar processing costs.
18 The term ‘processing’ does not include services of agency
19 personnel in resolving issues of law and policy of general
20 applicability which may be raised by a request or in review-
21 ing an appeal of an initial agency denial of a request, but
22 does include services involved in examining records for possi-
23 ble withholding or deletions to carry out determinations of
24 law or policy.

1 “(ii) Documents shall be furnished without charge when
2 the information is not requested for a commercial use, and
3 the request is being made by or on behalf of—

4 “(I) any individual or any educational or noncom-
5 mercial scientific institution intending to use the infor-
6 mation for scholarly or scientific research;

7 “(II) a person engaged in a journalistic activity;
8 or

9 “(III) a nonprofit group that intends to make the
10 information available to the general public.

11 Documents shall be furnished without charge or at a reduced
12 charge when the agency determines that the waiver or reduc-
13 tion of the fee is in the public interest because furnishing the
14 information is primarily benefiting the general public rather
15 than the commercial or other private interests of the
16 requester.

17 “(iii) Except as otherwise provided in this clause, all
18 fees collected under this section shall be deposited into the
19 Treasury as miscellaneous receipts. In the case of any
20 agency which substantially complies with the applicable time
21 limits of paragraph (6) of this subsection, one-half of the fees
22 collected under this section shall be retained by such agency
23 to offset the costs of complying with this section.”.

1 JUDICIAL REVIEW

2 SEC. 4. Section 552(a)(4) of title 5, United States Code,
3 is amended—

4 (1) by amending subparagraph (B) to read as
5 follows:

6 “(B) On complaint filed by a requester within one hun-
7 dred and eighty days from the date of final agency action or
8 by a submitter after a final decision by any agency to disclose
9 submitted information but prior to its release, the district
10 court of the United States in the district in which the com-
11 plainant resides, or has his principal place of business, or in
12 which the agency records are situated, or in the District of
13 Columbia, has jurisdiction—

14 “(i) to enjoin the agency from withholding agency
15 records and to order the production of any agency
16 records improperly withheld from the requester;

17 “(ii) to enjoin the agency from any disclosure of
18 records which was objected to by a submitter under
19 paragraph (7)(A)(iii) of this subsection or which could
20 have been objected to had notice been given as re-
21 quired by paragraph (7)(A)(i); or

22 “(iii) to enjoin the agency from improperly refus-
23 ing to waive or reduce fees as required by paragraph
24 (4)(A)(ii) of this subsection, or from failing to perform

1 its duties under paragraphs (1) and (2) of this
2 subsection.”;

3 (2) by redesignating subparagraphs (C), (D), (E),
4 (F), and (G) as subparagraphs (F), (G), (H), (I), and
5 (J), respectively, and by adding after subparagraph (B)
6 the following new subparagraphs:

7 “(C) In an action based on a complaint—

8 “(i) by a requester, the court shall have jurisdic-
9 tion over any submitter of information contained in the
10 requested records, and any such submitter may inter-
11 vene as of right in the action; and

12 “(ii) by a submitter, the court shall have jurisdic-
13 tion over any requester of records containing informa-
14 tion which the submitter seeks to have withheld, and
15 any such requester may intervene as of right in the
16 action.

17 “(D) The agency that is named as a defendant by the
18 complaint shall promptly, upon service of such complaint—

19 “(i) seeking the production of records, notify each
20 submitter of information contained in the requested
21 records that the complaint was filed; and

22 “(ii) seeking the withholding of records, notify
23 each requester of the records that the complaint was
24 filed.

1 “(E) In any case to enjoin the withholding or the disclo-
2 sure of records, the refusal to waive or reduce fees, or the
3 failure to comply with paragraph (1) or (2) of this subsection,
4 the court shall determine the matter de novo. The court may
5 examine the contents of requested agency records in camera
6 to determine whether such records or any part thereof shall
7 be withheld under any of the exemptions set forth in subsec-
8 tion (b) of this section. The burden is on the agency to sustain
9 its action to withhold information and the burden is on any
10 submitter seeking the withholding of information.”; and

11 (3) by amending redesignated subparagraph (H) to
12 read as follows:

13 “(H) The court may assess against the United
14 States reasonable attorney fees and other costs reason-
15 ably incurred during the administrative process by any
16 requester subsequent to the failure of any agency in
17 complying with the applicable time limit provisions of
18 paragraph (6) of this subsection. In addition the court
19 may assess against the United States or any submitter
20 who is a party to the litigation reasonable attorney fees
21 and other litigation costs reasonably incurred in any
22 case under this section in which the requester has sub-
23 stantially prevailed.”.

1 TIME LIMITS

2 SEC. 5. Paragraph (6) of section 552(a) of title 5, United
3 States Code, is amended to read as follows:

4 “(6)(A) Except as otherwise provided in this paragraph,
5 each agency, upon any request for records made under para-
6 graph (1), (2), or (3) of this subsection, shall—

7 “(i) determine within ten working days after the
8 receipt of any such request whether to comply with
9 such request and shall immediately notify the requester
10 of such determination and the reasons therefor, and of
11 the right of such requester to appeal to the head of the
12 agency any adverse determination; and

13 “(ii) make a determination with respect to any
14 appeal within twenty working days after the receipt of
15 such appeal, and if on appeal the denial of the request
16 for records is in whole or in part upheld, the agency
17 shall notify the requester of the provisions for judicial
18 review of that determination under paragraph (4) of
19 this subsection.

20 “(B) In unusual circumstances as defined in this subpar-
21 agraph, the time limits prescribed in either clause (i) or clause
22 (ii) of subparagraph (A) may be extended by written notice to
23 the requester setting forth the reasons for such extension and
24 the date on which a determination is expected to be dis-
25 patched. No such notice shall specify a date that would result

1 in extensions of more than an aggregate of thirty working
2 days. As used in this subparagraph, 'unusual circumstances'
3 means, but only to the extent reasonably necessary to the
4 proper processing of the particular request—

5 “(i) the need to search for and collect the
6 requested records from field facilities or other establish-
7 ments that are separate from the office processing the
8 request;

9 “(ii) the need to search for, collect, and appropri-
10 ately examine a voluminous amount of separate and
11 distinct records which are demanded in a single
12 request;

13 “(iii) the need for consultation, which shall be
14 conducted with all practicable speed, with another
15 agency having a substantial interest in the determina-
16 tion of the request or among two or more components
17 of the agency having substantial subject-matter interest
18 therein;

19 “(iv) a request which the head of the agency has
20 specifically stated in writing cannot be processed
21 within the time limits stated in subparagraph (A) of
22 this paragraph without significantly obstructing or im-
23 pairing the timely performance of a statutory agency
24 function;

1 “(v) the need for notification of submitters of in-
2 formation and for consideration of any objections to
3 disclosure made by such submitters; or

4 “(vi) an unusually large volume of requests or ap-
5 peals by an agency, creating a substantial backlog.

6 “(C) Any requester shall be deemed to have exhausted
7 all administrative remedies with respect to such request if the
8 agency fails to comply with the applicable time limit provi-
9 sions of this paragraph. If the Government can show excep-
10 tional circumstances exist and that the agency is exercising
11 due diligence in responding to the request, the court may
12 retain jurisdiction and allow the agency additional time to
13 complete a review of the records.

14 “(D) Upon any determination by an agency to comply
15 with a request for records, the records shall be made
16 promptly available to the requester, subject to the provisions
17 of paragraph (7) of this subsection. Any notification of denial
18 of any request for records under this subsection shall set forth
19 the names and titles or positions of each person responsible
20 for the denial of such request.

21 “(E) Each agency shall promulgate regulations, pursu-
22 ant to notice and receipt of public comment, by which a re-
23 quester who demonstrates a compelling need for expedited
24 access to records shall be given expedited access.”.

1 BUSINESS CONFIDENTIALITY PROCEDURES

2 SEC. 6. Section 552(a) of title 5, United States Code, is
3 amended by adding after paragraph (6) the following new
4 paragraph:

5 “(7)(A) Each agency shall promulgate regulations, pur-
6 suant to notice and receipt of public comment, specifying pro-
7 cedures by which—

8 “(i) a submitter may be required to designate, at
9 the time it submits or provides to the agency or any-
10 time thereafter, any information consisting of trade se-
11 crets, or commercial, research, or financial information
12 which is exempt from disclosure under subsection
13 (b)(4);

14 “(ii) the agency shall notify the submitter that a
15 request has been made for information provided by the
16 submitter, within five working days after the receipt of
17 such request, and shall describe the nature and scope
18 of the request and advise the submitter of his right to
19 submit written objections in response to the request;

20 “(iii) the submitter may, within ten working days
21 of the forwarding of such notification, submit to the
22 agency written objection to such disclosure specifying
23 all grounds for such objection;

24 “(iv) the agency may dispense with notification
25 under clause (ii) of this subparagraph for classes of doc-

1 uments which the agency designates are unlikely to
2 contain any information exempt from disclosure under
3 subsection (b)(4), if the agency provides the submitter
4 with the opportunity to file written objections to the
5 disclosure of any information contained in such docu-
6 ments at the time of the submission of such documents;
7 and

8 “(v) the agency shall notify the submitter of any
9 final decision regarding the release of such information.

10 “(B) An agency is not required to notify a submitter
11 pursuant to subparagraph (A) if—

12 “(i) the information requested is not designated by
13 the submitter as exempt from disclosure in accordance
14 with agency regulations promulgated pursuant to sub-
15 paragraph (A)(i), if such designation is required by the
16 agency;

17 “(ii) the agency determines, prior to giving such
18 notice, that the request should be denied;

19 “(iii) the disclosure is required by law (other than
20 this section); or

21 “(iv) the information lawfully has been published
22 or otherwise made available to the public.

23 “(C) Whenever an agency notifies a submitter of the
24 receipt of a request pursuant to subparagraph (A), the agency
25 shall notify the requester that the request is subject to the

1 provisions of this paragraph and that notice of the request is
2 being given to a submitter. Whenever an agency notifies a
3 submitter of final decision pursuant to subparagraph (A), the
4 agency shall at the same time notify the requester of such
5 final decision.

6 “(D) Whenever a submitter has filed objections to dis-
7 closure pursuant to clause (iii) or (iv) of subparagraph (A), the
8 agency shall not disclose any information determined not to
9 be exempt from disclosure under subsection (b)(4) for ten
10 working days after notice of the final decision to release the
11 requested information has been forwarded to the submitter.

12 “(E) The disposition by the agency of the request and
13 the objections by the submitter shall be subject to judicial
14 review pursuant to paragraph (4) of this subsection. If a re-
15 quester files a complaint under this section, the administra-
16 tive remedies of a submitter of information contained in the
17 requested records shall be deemed to have been exhausted.

18 “(F) If a requester is an intervenor or is joined as a
19 defendant in an action brought by a submitter under this sec-
20 tion, the action shall, upon motion of the requester, be trans-
21 ferred to a district court which would have had jurisdiction
22 had the action been brought by the requester, unless the
23 court otherwise directs for the convenience of parties and
24 witnesses or in the interest of justice.

14

1 “(G) Nothing in this paragraph shall be construed to be
2 in derogation of any other rights established by law protect-
3 ing the confidentiality of private information.”.

DEFINITIONS

5 SEC. 7. Section 552(e) of title 5, United States Code, is
6 amended to read as follows:

7 “(e) For purposes of this section—

8 “(1) the term ‘agency’ means agency as defined in
9 section 551(1) of this title and includes any executive
10 department, military department, Government corpora-
11 tion, Government controlled corporation, or other es-
12 tablishment in the executive branch of the Government
13 (including the Executive Office of the President), or
14 any independent regulatory agency;

15 “(2) the term ‘requester’ means any person who
16 makes or causes to be made, or on whose behalf is
17 made, a proper request for disclosure of records under
18 subsection (a);

19 “(3) the term ‘submitter’ means any person who
20 has submitted to an agency (other than an intelligence
21 agency), or provided an agency access to, trade se-
22 crets, or commercial, research, or financial information
23 (other than personal financial information) in which the
24 person has a commercial or proprietary interest; and

15

1 “(4) the term ‘working days’ means every day
2 excluding Saturdays, Sundays, and Federal legal
3 holidays.

4 UNIFORM REQUIREMENTS FOR THE ENACTMENT OF (b)(3)
5 WITHHOLDING STATUTES

6 SEC. 8. (a) Section 552 of title 5, United States Code, is
7 amended by adding after subsection (e) the following new
8 subsection:

9 “(f)(1) No statute enacted after thirty days after the date
10 of enactment of this subsection shall directly or indirectly
11 constitute authority for withholding information under sub-
12 section (b)(3) of this section unless the provisions of such stat-
13 ute specifically reference such withholding and meet the cri-
14 teria specified in subsection (b)(3).

15 “(2) Within one hundred and eighty days of the date of
16 the enactment of this subsection any agency which relies or
17 intends to rely on any statute to withhold information under
18 subsection (b)(3) of this section which was enacted prior to
19 the date of enactment of this subsection or during the thirty-
20 day period after such date shall cause to be published in the
21 Federal Register a list of all such statutes and a description
22 of the scope of the information covered. There shall also be
23 published a final compilation of all such listings in the Feder-
24 al Register upon the completion of the one hundred and
25 eighty-day period described in the preceding sentence. No

1 agency may rely, after one hundred and eighty days after the
2 date of enactment of this subsection on any such statute not
3 listed.

4 “(3) Effective six years after the date of enactment of
5 this subsection, no statute may be relied on to withhold infor-
6 mation under subsection (b)(3) of this section unless the provi-
7 sions of such statute comply with the requirements of para-
8 graph (1) of this subsection.

9 “(4)(A) Any bill or resolution which contains provisions
10 directly or indirectly constituting authority for withholding
11 information under subsection (b)(3) of this section shall be
12 referred to the appropriate committees of the House of Rep-
13 resentatives and the Senate pursuant to the rules of each
14 House, and in addition, to the appropriate committees of the
15 House of Representatives and the Senate having jurisdiction
16 over the provisions of this section, if such committees so
17 request.

18 “(B) No bill or resolution described in subparagraph (A)
19 of this paragraph shall be considered in the House of Repre-
20 sentatives or the Senate unless it is a bill or resolution which
21 has been reported by the appropriate committees described in
22 subparagraph (A) or from the consideration of which such
23 committees have been discharged.

24 “(C) It shall not be in order in either the House of Rep-
25 resentatives or the Senate to consider any bill or resolution

1 described in subparagraphs (A) and (B) of this paragraph
2 unless the procedures of such subparagraphs have been
3 followed.”.

4 (b) Subsection (f) of section 552 of title 5, United States
5 Code, is enacted by Congress—

6 (1) as an exercise of the rulemaking power of the
7 Senate and the House of Representatives, respectively,
8 and as such is deemed a part of the rules of each
9 House, respectively, but applicable only with respect to
10 the procedure to be followed in that House in the case
11 of bills or resolutions described by subsection (f) of sec-
12 tion 552 of title 5, United States Code; and supersedes
13 other rules only to the extent inconsistent therewith;
14 and

15 (2) with full recognition of the constitutional right
16 of either House to change the rules (so far as relating
17 to the procedure of that House) at any time, in the
18 same manner and to the same extent as in the case of
19 any other rule of that House.

○